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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

10 FEDERAL NATIONAL MORTGAGE
11 ASSOCIATION, a government-sponsored
12 entity; FEDERAL HOUSING FINANCE
13 AGENCY, as Conservator of Fannie Mae,

14 Plaintiffs,
15 vs.

16 SFR INVESTMENTS POOL 1, LLC, a
17 Nevada Limited Liability Company; SUN
18 CITY ALIANTE COMMUNITY
19 ASSOCIATION, a Nevada Non-Profit
20 Corporation; DOES I through X, inclusive; and
21 ROE CORPORATIONS I through X,
22 inclusive,

23 Defendants.

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Case No.: 2:14-cv-02046-JAD-PAL

**SFR INVESTMENTS POOL 1, LLC's
RESPONSE TO PLAINTIFFS' MOTION
FOR SUMMARY JUDGMENT [DKT. NO.
107]**

MEMORANDUM OF POINTS & AUTHORITIES

I. INTRODUCTION

29 A litigant's case is only as good as her evidence. This is especially true for summary
30 judgment because the movant's evidence must be "so powerful that no reasonable jury would be
31 free to disbelieve it." *Shakur v. Schriro*, 514 F.3d 878, 890 (9th Cir. 2008) (internal citation
32 omitted). Here, Plaintiffs' evidence, in support of their Motion for Summary Judgment, is not so
33 "powerful." Far from it; Plaintiffs' evidence is either disputed or "blatantly contradicted by the
34 record so that no reasonable jury could believe it . . ." *Scott v. Harris*, 550 U.S. 372, 380 (2007).

35 For example, Plaintiffs boast that "it is undisputed" that the mortgage was not "held in
36 trust" on July 26, 2013, the day that Association sold the house to SFR. Dkt. No. 107, 9:19. This

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1 is wrong. Specifically, John Curcio's deposition testimony, and the "Notice of Default & Election
 2 to Sell Under Deed of Trust," prove that the mortgage *was* "held in trust" when Association sold
 3 the house to SFR (i.e. July 26, 2013).¹ Ex. A, 51:7-15; Ex. B, 2. During his deposition, Mr. Curcio
 4 testified that the mortgage was taken out of trust approximately ninety days after the borrower
 5 defaulted on her mortgage. Ex. A, 51:15. According to the Notice of Default, the borrower
 6 defaulted on July 1, 2013. Ex. B, 2. Based on Mr. Curcio's testimony, the mortgage was taken out
 7 of trust approximately ninety days after July 1, 2013, well after Association's July 26, 2013, sale.
 8 Dkt. No. 108-4, 1 (SFR Foreclosure Deed Upon Sale).

- 9 • Default: July 1, 2013.
- 10 • Association's sale: July 26, 2013.
- 11 • Mortgage allegedly taken out of trust: approximately ninety days after July 1, 2013.

12 Therefore, Mr. Curcio's deposition testimony and the Notice of Default are evidence that the
 13 mortgage was "held in trust" when Association sold the house to SFR. Plaintiffs' so-called
 14 evidence to the contrary is "blatantly contradicted by the record . . ." *Scott*, 550 U.S. at 380. The
 15 same holds for the "cryptic" printouts that are attached to Mr. Curcio's declaration. *LN Mgmt. LC*
 16 *Series 5271 Lindell v. Estate of Piacentini*, No. 2:15-cv-00131-JAD-NJK, 2015 WL 6445799, at
 17 *2 (D. Nev. Oct. 8, 2015).

18 The "cryptic" printouts allegedly come from Fannie's Servicer & Investor Reporting
 19 platform ("SIR"), a system that Plaintiffs revere but cannot fully explain. Though Plaintiffs have
 20 yet to describe what all of the abbreviations in SIR mean, this much is clear: SIR is more
 21 disappearing act than it is business record, containing several indications of "a lack of
 22 trustworthiness." FRE 803(6)(E). Plaintiffs' first Motion for Summary Judgment included a
 23 declaration from Mr. Curcio. Dkt. No. 69-1. Three SIR tabs were attached to his declaration:
 24 Origination, Acquisition, and Property. Dkt. No. 69-1, Ex. A, 5-7. The Origination page identified
 25 November 1, 2006, as the date that the Note was signed. *Id.* at 5. This date conflicted with the

26 ¹ Then again, Congress intended that if a mortgage is "held in trust," then that mortgage "shall"
 27 remain "in trust" because FHFA "shall" continue to hold that mortgage "in trust" for "the
 28 beneficial owners of such mortgage," 4617(b)(19)(B)(ii), who consist of "any person other than"
 Fannie. 4617(b)(19)(B)(i).

1 Deed of Trust, which indicated that the Note was signed on November 17, 2006. Dkt. No. 70-1,
 2 Ex. 1, 2:~~F~~. During his deposition, Mr. Curcio could not explain this discrepancy. Ex. A, 70:5-25
 3 - 71:1. And so, Plaintiffs made the Origination Tab disappear; they did not attach it to Mr. Curcio's
 4 second declaration in support of their second Motion for Summary Judgment. Dkt. No. 107-2, Ex.
 5 A. Additional disappearing acts take place in SIR's so-called Loan Activity History ("LAH").

6 The LAH seemingly contains nine columns: Transaction ID, Reversal Transaction ID,
 7 Effective Date, Process Date, Activity Period, Reported UPB (\$), Interest Difference (\$), Action
 8 Code – Action Description, and Action Date. Dkt. No. 107-2, Ex. A, 8-17. But all is not as it seems
 9 with the LAH. On one page, the "Action Date" column disappears, and a new column materializes
 10 entitled "Applied Interest (\$)." *Id.* at 11. This new column then ceases to exist on the remaining
 11 LAH pages, and "Action Date" reappears. *Id.* at 8-10, 12-17.

Reported UPB (\$)	Interest Difference (\$)	Action Code - Action Description	Action Date
Reported UPB (\$)	Applied Interest (\$)	Interest Difference (\$)	Action Code - Action Description

16 Also, there are hidden columns, creeping out from behind some of the visible headings. The below
 17 graphic is from the second LAH page attached to Mr. Curcio's declaration. The arrow points to a

Reported UPB (\$)	Actual UPB (\$)	Eff Date	Principal Repaid (\$)	Applied Interest (\$)
			\$125,455.32	

18 mystery column peeking from behind the "Reported UPB (\$)" column.
 19 *Id.* at 8. Worse yet, LAH pages—attached to Mr. Curcio's declarations
 20 filed in other cases—have different columns than those displayed in
 21 this case. In some Nevada state court lawsuits, four columns follow
 22 "Reported UPB (\$)" that are nowhere to be found here:

Reported UPB (\$)	Actual UPB (\$)	Eff Date	Principal Repaid (\$)	Applied Interest (\$)

23 Ex. C, 7; Ex. D, 8. Meanwhile, in this case, three (rather than four) different columns follow
 24 "Reported UPB (\$)." Dkt. No. 107-2, Ex. A, 8.

Reported UPB (\$)	Interest Difference (\$)	Action Code - Action Description	Action Date

25 Ultimately, the LAH is easily manipulated, a malleable magic show where columns disappear and
 26

1 sometimes reappear without explanation. Mr. Curcio's declaration has similar flaws.

2 Mr. Curcio's declaration contradicts statements that he made to Judge Mahan, Judge Du,
 3 and Judge Boulware. Here, Mr. Curcio's declaration claims that "had Fannie . . . ceased to own
 4 this Loan . . . information reflecting that would appear under the 'Action Code – Action
 5 Description' column on the" LAH. Dkt. No. 107-2, 3:6-8 (¶8). So, if a notation is in the "Action
 6 Code – Action Description" column, then Fannie does not own the mortgage. *Id.* One such notation
 7 is "70 – Fcl – Liq/Held for Sale." Ex. E, 6; Ex. F, 6; Ex. G, 4.



8 According to Mr. Curcio's declaration, this notation means that
 9 Fannie does not own a mortgage because it is "information under
 10 the" Action Code – Action Description column. Dkt. No. 107-2,
 11 3:6-8 (¶8). Yet, Mr. Curcio told Judge Mahan, Judge Du, and Judge Boulware the opposite. In
 12 cases before these judges, Plaintiffs used LAHs that included the "70 – Fcl – Liq/Held for Sale"
 13 notation under the "Action Code – Action Description" column. Despite containing this notation,
 14 Mr. Curcio declared that Fannie still owned the mortgages in those cases. Ex. E, 3:5-8 (¶4), 6; Ex.
 15 F, 2:24-27 – 3:1 (¶4), 6; Ex. G, 2:3-5 (¶4), 4. More contradictions and inconsistencies plague Mr.
 16 Curcio's testimony, all of which are reviewed below. By way of a preview, his testimony disproves
 17 Fannie's alleged purchase and ownership of the mortgage.

18 At bottom, this Court should deny Plaintiffs' Motion for Summary because Plaintiffs'
 19 evidence is either disputed or "blatantly contradicted by the record so that no reasonable jury could
 20 believe it . . ." *Scott*, 550 U.S. at 380. Besides, there is one insurmountable obstacle to Plaintiffs
 21 obtaining summary judgment, an undisputed fact that Plaintiffs have called a "silver bullet" to
 22 their claims: The mortgage was "held in trust." Dkt. No. 99-2, 15:4-7. This defeats Plaintiffs'
 23 Motion because it precludes Plaintiffs from "being entitled to judgment as a matter of law." 56(a).

24 **II. LR 56-1 STATEMENT OF UNDISPUTED FACTS**

25 **1.** A deed of trust ("DOT") between Maureen V. Beverly ("Beverly") and Pulte
 26 Mortgage, LLC was recorded on November 22, 2006, regarding a house at 7445 Crested Quail
 27 Street, North Las Vegas, Nevada 89084. Dkt. No. 70-1, Ex. 1, 1. The house is governed by
 28 Association's CC&Rs. Dkt. No. 70-1, Ex. 1, 16.¶2.

1 2. After Beverly stopped paying her Association dues, Association sold the house to
 2 SFR at a July 26, 2013, public auction. Dkt. No. 1, 6:6-10 (¶31); Dkt. No. 108-4, 1. Association's
 3 sale was through its CC&Rs and NRS Chapter 116. Dkt. No. 108-4, 1. Pursuant to this transaction,
 4 and under Nevada law, SFR obtained state-recognized property interests. Dkt. No. 1, 6:6-10 (¶31);
 5 Dkt. No. 41, 10:24-27 (n.4). FHFA reviewed Association's sale and decided not to consent to
 6 extinguishment. Dkt. No. 1, 6:17-18 (¶34); Dkt. No. 41, 2:22-23.

7 3. Plaintiffs "[a]gree that they bear the burden of showing a property interest that
 8 [4617(j)(3)] could protect." *Kielty v. Fed. Home Loan Mortg. Corp.*, No. 2:15-cv-00230-RCJ-
 9 GWF (D. Nev. 2015) (Dkt. No. 44, 4:15-16) (filed Nov. 23, 2015).

10 4. On February 1, 2016, Mr. Curcio was deposed, and testified that the mortgage was
 11 "held in trust."² Dkt. No. 108-1, 44:15-16. Plaintiffs' supplemental interrogatory responses
 12 admitted that the mortgage was "held in trust." Dkt. No. 108-2, 2:3-6; Dkt. No. 108-3, 2:12-15.

13 **III. LR 56-1 STATEMENT OF DISPUTED FACTS & SFR's OBJECTIONS**³

14 1. **SFR Disputes & Objects to Assertion 2:** Mr. Curcio's second declaration and the
 15 LAH contradict, and thus, dispute Assertion 2 because they establish that Fannie did not purchase
 16 the mortgage on December 1, 2006. Ex. A, 51:7-15; Ex. B, 2. And, SFR objects to Assertion 2
 17 because it is based on hearsay. The SIR printouts do not satisfy the 803(6) exception to hearsay
 18 because: (i) Mr. Curcio is not a "qualified witness," (ii) the SIR records regarding Fannie's
 19 purported purchase of the mortgage were not made "at or near the time of the transaction" (i.e.
 20 December 1, 2006), and (iii) there is evidence that the SIR printouts are untrustworthy. 803(6)(E).

21 2. **SFR Disputes & Objects to Assertion 3:** Mr. Curcio's deposition testimony and
 22 Plaintiffs' supplemental interrogatory responses prove that the mortgage was "held in trust,"
 23 thereby disputing Assertion 3's statement that FHFA supposedly "succeeded to" the mortgage.
 24 SFR objects to Assertion 3 because it lacks evidentiary support. 56(c)(1)(A); LR 56-1.

25 3. **SFR Objects to Assertions 4-5:** SFR objects to Assertions 4-5—regarding how

26 2 Though Mr. Curcio discussed the "pooling" of the "loan," this Response uses "held in trust" and
 27 "mortgage" to be consistent with 12 U.S.C. § 4617(b)(19)(B)'s structure and text.

28 3 In this section, SFR summarizes its disputes and objections. The "Legal Argument" sections
 present these disputes and objections in more detail.

1 Fannie allegedly securitizes mortgages and a purported exemplar trust agreement—because they:
 2 (i) violate FRE 1002's Best Evidence Rule, (ii) are based on a declaration that replaces facts with
 3 legal conclusions, and (iii) are irrelevant.

4 **4. SFR Disputes & Objects to Assertion 6:** Mr. Curcio's deposition and the Notice
 5 of Default contradict, and hence, dispute Plaintiffs' assertion that the mortgage was "removed
 6 from" a trust. SFR objects to Assertion 6 because 12 U.S.C. § 4617(b)(19)(B) renders it irrelevant.

7 **IV. LEGAL ARGUMENT I: THE EVIDENCE IS BLATANTLY CONTRADICTED BY THE RECORD**

8 **A. Summary Judgment Standard**

9 Summary judgment is appropriate when the pleadings and admissible evidence show
 10 "[t]hat there is no genuine dispute as to any material fact and the movant is entitled to judgment
 11 as a matter of law." 56(a). An inability to meet this burden precludes summary judgment. *Adickes*
 12 *v. S.H. Kress & Co.*, 398 U.S. 144, 159-60 (1970). Likewise, if admissible evidence proves that
 13 the movant is not "entitled to judgment as a matter of law," then summary judgment is
 14 inappropriate. *California v. Campbell*, 138 F.3d 772, 782 (9th Cir. 1988); 56(a). Summary
 15 judgment is also improper when a litigant's evidence is "blatantly contradicted by the record so
 16 that no reasonable jury could believe it . . ." *Scott*, 550 U.S. at 380.

17 **B. Plaintiffs have the Burden of Proving Quiet Title**

18 Plaintiffs' quiet title claim requires them to prove that: (i) they have an interest in the house
 19 and (ii) that interest is superior to SFR's interests. *Chapman v. Deutsche Bank Nat'l Trust Co.*, 302
 20 P.3d 1103, 1106 (Nev. 2013) (internal citations omitted). Evidence of a superior interest must be
 21 enough to overcome the "presumption in favor of the record titleholder" who is, in this case, SFR.
 22 *Brelian v. Preferred Equities Corp.*, 918 P.2d 314, 318 (Nev. 1996). Hence, if evidence shows
 23 that Plaintiffs lack an interest in the house, then they cannot prevail on their quiet title claim.⁴

24 **C. The Record Contradicts Plaintiffs' Evidence that Fannie Bought the Mortgage**

25 As just mentioned, Plaintiffs' quiet title claim requires them to prove that they have an
 26 interest in SFR's house. Plaintiffs try to do so by claiming that Fannie purchased the mortgage on

27
 28 ⁴ Similarly, a litigant cannot obtain quiet title when admissible evidence reveals that—despite
 possessing interests in a specific property—such interests are inferior to an adversary's interests.

1 December 1, 2006. Their primary piece of evidence is an unadorned entry on the SIR Acquisition
 2 Tab: **Acquisition Date** **12/01/2006** . Dkt. No. 107-2, Ex. A, 6.
 3 Mr. Curcio opined that this naked notation—a mere two words without any accompanying
 4 narrative or factual context—“reflects” that Fannie purchased and began to own the mortgage on
 5 December 1, 2006. Dkt. No. 107-2, 2:20-24 (¶¶ 4-5). At the same time, Mr. Curcio declared that
 6 the SIR LAH pages **Loan Activity History** purportedly show that the servicer reported
 7 information to Fannie for every month that Fannie owned the mortgage; each month that
 8 information was reported was called an “Activity Period.” (Activity Period). *Id.* at 2:27-28 – 3:1-5
 9 (¶7). The following graphic is the mortgage’s first “Activity Period”:
 10 **01/01/2009** : **02/02/2009** **01/31/2009** . Dkt. No. 107-2, Ex. A, 17. So, the LAH—based on
 11 Mr. Curcio’s declaration—supposedly proves that the earliest possible date for when Fannie could
 12 have purchased or owned the mortgage is January 2009, *more than two years after Plaintiffs claim*
 13 *that Fannie bought the mortgage*. Mr. Curcio’s sworn declaration could not be clearer, “If Fannie
 14 Mae did not own this Loan, this loan activity history information would not have been reported to
 15 Fannie Mae.” Dkt. No. 107-2, 3:4-5 (¶7). Because no such information was reported to Fannie
 16 from December 1, 2006, until January 1, 2009, Mr. Curcio’s declaration and the LAH “blatantly
 17 contradict” Plaintiffs’ “evidence” that Fannie bought the mortgage on December 1, 2006. All told,
 18 the record blatantly contradicts Plaintiffs’ evidence that Fannie bought the mortgage.⁵

19 **D. FRE 803(6)’s Business Records Exception to Hearsay is Inapplicable to SIR**

20 Realizing that SIR is hearsay, Plaintiffs try to trigger 803(6) by telling this Court that SIR
 21 printouts are “business records” introduced by Mr. Curcio, a so-called “qualified witness.” Dkt.
 22 No. 107, 8:10—12. None of this is correct; SIR is hearsay, not “business records,” and Mr.
 23 Curcio—while he might be many things (i.e. Assistant Vice President when he signs a declaration,
 24 which he does approximately ten times per week without personally accessing the SIR system, or
 25 “director of the services support center within credit portfolio management”—he is most

27 ⁵ SFR objects to Assertion #2 (i.e. that Fannie’s alleged purchase of the mortgage supposedly
 28 caused it to own the note and DOT) because it is a legal conclusion. 56(c)(1)(A); LR 56-1. *Wicker*
v. Oregon, 543 F.3d 1168, 1177 (9th Cir. 2008).

1 assuredly not a “qualified witness.” Dkt. No. 108-1, 28:11, 28:21-23, 34:19-25 – 35:1, 35:8-9.

2 **1. Information was not Transmitted at or Near December 1, 2006**

3 803(6)’s Business Records Exception mandates that the records must be made or based on
 4 information that is transmitted “at or near the time of the transaction” *SEC v. Jasper*, 678 F.3d
 5 1116, 1122 n.2 (9th Cir. 2012). Here, “the transaction” that is predominantly at issue is Fannie’s
 6 supposed purchase of the mortgage on December 1, 2006. Recall that Mr. Curcio believes that a
 7 naked notation on the Acquisition Tab proves that Fannie bought the mortgage on December 1,
 8 2006: **Acquisition Date** **12/01/2006**. Dkt. No. 107-2, 2:20-24 (¶ 4-5). During
 9 his deposition, Mr. Curcio said, “here it says on this screen on the left-hand side, the Acquisition
 10 Date, December 1, 2006.” Ex. A, 55:6-8. Then, his declaration contends that “entries into SIR are
 11 made at or near the time of the events,” which in this case would be December 1, 2006. Dkt. No.
 12 107-2, 2:13 (¶3). This is patently false, a physical impossibility. The information in the SIR
 13 printouts attached to Mr. Curcio’s declaration could not have been entered into SIR “at or near”
 14 December 1, 2006. This is so because **SIR did not exist in 2006**; SIR was created more than two
 15 years later. Ex. H, 3:5-7. And this is precisely what one of Fannie’s interrogatory responses proves,
 16 a response that *Mr. Curcio verified under penalty of perjury*. *Id.* at 6. The response states that “in
 17 **February 2009 information concerning the Loan was transferred from the LASER reporting**
 18 **platform to the new Servicer & Investor Reporting platform (‘SIR’).**” *Id.* at 3:5-7 (emphasis
 19 added). Not a single page from LASER has been produced by Fannie in this case. To make matters
 20 worse, and despite verifying the response that Fannie started using SIR in February 2009, Mr.
 21 Curcio claimed in his deposition that “I do not know” when Fannie began using SIR. Ex. A, 42:7.
 22 Respectfully, this is too much. The Mr. Curcio who was deposed did “not know” when Fannie
 23 started to use SIR, but the Mr. Curcio who signed Fannie’s interrogatory responses declared “under
 24 penalty of perjury” that Fannie began to use SIR in February 2009. Either way, Plaintiffs cannot
 25 satisfy 803(6)(A) because information in SIR was not transmitted at or near December 1, 2006.

26 **2. Mr. Curcio is not a “Qualified Witness”**

27 803(6)(D) requires Mr. Curcio to be a “qualified witness,” a phrase that Plaintiffs will
 28 undoubtedly note is “broadly interpreted” by the Ninth Circuit. *United States v. Ray*, 930 F.2d

1 1368, 1370 (9th Cir. 1990). Though broad, the phrase has limits. In order to be a “qualified
 2 witness,” Mr. Curcio must be familiar with SIR. *Id.* Here, Mr. Curcio’s deposition testimony
 3 proved that he was not “familiar” with SIR. Ex. A, 46:15-17. When asked to explain where the
 4 loan history was located within SIR, Mr. Curcio confessed that he did not know, prompting the
 5 following exchange, “Q. Who would know how to get to that particular section? A. Someone
 6 familiar with SIR. Q. And who is that? A. Someone on my team.” *Id.* at 46:13-17. When asked
 7 who was “familiar with SIR,” Mr. Curcio did not respond “me.” Rather, he quickly retorted,
 8 “someone on my team,” a tacit acknowledgement that Mr. Curcio is *not* familiar with SIR.

9 Plaintiffs will try to minimize this revealing testimony by claiming that Mr. Curcio can
 10 supposedly be a “qualified witness” because he—at least in Plaintiffs’ estimation—“cogently
 11 explained the SIR database” by purportedly testifying that information is “initially provided by the
 12 seller of the loan but is validated or corrected before being transmitted into SIR by Fannie Mae’s
 13 acquisition system.” Dkt. No. 107, 8:13. This, however, is a more than generous, and slightly
 14 misleading, depiction of Mr. Curcio’s testimony; it alludes to a portion of Mr. Curcio’s deposition
 15 where he testified about how he thinks SIR might work in some sort of general sense. Ex. A, 37:21-
 16 25 – 38:1-8. But later, Mr. Curcio testified about the specific mortgage involved in this case, the
 17 one that Fannie allegedly purchased on December 1, 2006. *Id.* at 53:18-20. Such testimony—
 18 including the question and Mr. Curcio’s answer—is unmistakably clear, “Q. Does Fannie Mae
 19 itself input information into SIR for this loan ever? A. No.” *Id.* So, for *this case’s mortgage* Fannie
 20 has never put information into SIR, which contradicts Mr. Curcio’s previous testimony. Speaking
 21 of contradictions, Mr. Curcio has described SIR in so many contradictory ways that he is not
 22 “knowledgeable as to the manner in which the records are made and kept,” *N.L.R.B. v. First*
 23 *Termite Control Co., Inc.*, 646 F.2d 424, 427 (9th Cir. 1981), precluding him from being a
 24 “qualified witness.” Dkt. No. 105, 18:7-28 – 19:1-21. And this makes sense; by his own account,
 25 Mr. Curcio is not “familiar” with SIR. Ex. A, 46:15-17. Thus, Mr. Curcio is not a qualified witness.

26 **3. *SIR Printouts are Inadmissible because of 803(6)(E)***

27 Under 803(6)(E), if there is evidence that a would-be business record has “a lack of
 28 trustworthiness,” then that record is inadmissible; it cannot meet 803(6)’s exception to hearsay.

1 Contradictory statements pertaining to a record “indicate a lack of trustworthiness.” *Chadwell v.*
 2 *Koch Ref. Co., L.P.*, 251 F.3d 727, 732 (8th Cir. 2001). Here, Mr. Curcio’s statements about SIR—
 3 in this case and in a lawsuit pending before Chief Judge Navarro—contain contradictions. These
 4 contradictions are troubling because they call into question statements that Mr. Curcio has
 5 made under penalty of perjury to federal and state judges throughout Nevada. What Mr.
 6 Curcio swore as being “true and correct” in Chief Judge Navarro’s court, is somehow *incorrect* in
 7 cases before Judge Mahan and Judge Du.

8 Specifically, in a December 18, 2015, declaration Mr. Curcio told Chief Judge Navarro
 9 that if Fannie purportedly owns a mortgage, then Fannie’s databases, including SIR, describe that
 10 mortgage as being “active.” **Active** Ex. I, 2:19-21 (¶8), 3:15-18 (¶11). Conversely, when Fannie
 11 “no longer maintains an ownership interest” in a mortgage, then SIR describes that mortgage as
 12 “inactive.” **Inactive** *Id.* This directly contradicts what Mr. Curcio told Judge Mahan and Judge
 13 Du. In cases before Judge Mahan and Judge Du, SIR printouts indicated that their corresponding
 14 mortgages were “inactive.” Ex. E, 5; Ex. F, 5. The General Loan tab—which Plaintiffs have
 15 conveniently kept from this Court and SFR in the instant matter—displayed the following notation:
 16 **Loan Status** **Inactive** *Id.* Despite being “inactive,” Mr. Curcio
 17 declared—under penalty of perjury—that Fannie owns the mortgages. Ex. E, 3:5-8 (¶4); Ex. F,
 18 2:25-27 – 3:1-2 (¶4). This is astounding; Mr. Curcio told Judge Mahan and Judge Du that Fannie
 19 owns “inactive” mortgages even though Mr. Curcio told Chief Judge Navarro that Fannie *does not*
 20 *own* “inactive” mortgages. This contradiction indicates that SIR has “a lack of trustworthiness.”
 21 803(6)(E); *Chadwell*, 251 F.3d at 732. The same holds for a contradiction in Mr. Curcio’s
 22 declaration that Plaintiffs have submitted to this Court.

23 Here, Mr. Curcio’s declaration asserts that if Fannie did not own the mortgage, then
 24 “information reflecting that would appear under the ‘Action Code – Action Description’” column.

25 **Action Code - Action Description**

Dkt. No. 107-2, 3:6-11 (¶8).

26 **In three other federal cases, Mr. Curcio has said the exact**
 27 **opposite, declaring—under penalty of perjury—that Fannie**
 28 **owns mortgages even when information appears under the**

1 **Action Code – Action Description column.** Ex. E, 3:5-8 (¶4), 6; Ex. F, 2:25-27 – 3:1-2 (¶4), 6;
 2 Ex. G, 2:3-5 (¶4), 4. This “information” typically consists of the notation captured in the above
 3 graphic, “70 – Fcl – Liq/Held for Sale.” Judge Mahan, Judge Du, and Judge Boulware all have
 4 cases involving SIR printouts with this notation under the “Action Code – Action Description.”
 5 Ex. E, 6; Ex. F, 6; Ex. G, 4. And yet, in those cases, Mr. Curcio has stated that Fannie owns the
 6 mortgages, a representation that cannot be reconciled with his declaration in the present case. Ex.
 7 E, 3:5-8 (¶4), 6; Ex. F, 2:25-27 – 3:1-2 (¶4), 6; Ex. G, 2:3-5 (¶4), 4. This contradiction is but further
 8 proof that SIR has “a lack of trustworthiness.” 803(6)(E). Regardless, any doubt that might remain
 9 about SIR’s trustworthiness is put to rest by the LAH pages.

10 This Response’s Introduction described several ways that the LAH mutates, serving as
 11 another reason why SIR has “a lack of trustworthiness.” Entire columns disappear and sometimes
 12 reappear for a given mortgage. Dkt. No. 107-2, Ex. A, 11. Others merely peek out from behind
 13 visible columns. *Id.* at 8. Then there are columns that the LAH for this mortgage lacks but
 14 materialize on LAH pages for mortgages in other cases. Ex. C, 7; Ex. D, 8; Ex. J, 5 (“Other Fees
 15 Collected (\$)’); Ex. K, 5 (“Other Fees Collected (\$)’). The disappearing act that is LAH raises “a
 16 lack of trustworthiness” that triggers 803(6)(E). In doing so, the SIR printouts attached to Mr.
 17 Curcio’s declaration are not business records for purposes of 803(6). Oh, and one final point.
 18 Originally, Plaintiffs attached a single LAH page to Mr. Curcio’s declaration in support of their
 19 initial Motion for Summary Judgment. Dkt. No. 69-1, Ex. A, 8. During Mr. Curcio’s deposition,
 20 he testified that this solitary piece of paper—which was limited to information ranging from
 21 February 1, 2014, through November 1, 2014—allegedly demonstrated that Fannie purchased the
 22 mortgage on December 1, 2006, “and has owned it ever since.” Ex. A, 55:9-11. SFR’s Motion to
 23 Supplement the Record demonstrated the temporal impossibility of this *misrepresentation*; the
 24 isolated LAH page attached to Mr. Curcio’s first declaration could not *on its face* prove a single
 25 thing about any event that occurred before February 1, 2014. Dkt. No. 105, 19:26-28 – 21:1-4.
 26 Perhaps owing to this observation, Plaintiffs scrambled to attach nine more LAH pages to Mr.
 27 Curcio’s second declaration, and deleted the phrase, “and has owned it ever since,” from his
 28 declaration. Dkt. No. 107-2, 2:22 (¶4); Dkt. No. 107-2, Ex. A, 8-17. Alas, the earliest date that

1 appears on these LAH pages is January 1, 2009, well after Fannie's alleged December 1, 2006,
 2 purchase of the mortgage. Dkt. No. 107-2, Ex. A, 17. Consistent with Mr. Curcio's second
 3 declaration, the absence of LAH pages for December 1, 2006, proves that Fannie did not own the
 4 mortgage on that date, the very day that Mr. Curcio has repeatedly claimed as being when Fannie
 5 purchased the mortgage. Dkt. No. 107-2, 3:4-5 (¶7) ("If Fannie Mae did not own this Loan, this
 6 loan activity information would not have been reported to Fannie Mae."). In sum, the SIR printouts
 7 are inadmissible because of 803(6)(E).

8 **E. Plaintiffs' "Evidence" about Securitization is Inadmissible**

9 Plaintiffs' professed "evidence" about securitization is inadmissible. **First**, Plaintiffs rely
 10 on a six-paragraph-declaration from another case. Dkt. No. 107-4. Unsurprisingly, this declaration
 11 provides no insights about the mortgage that Fannie purportedly purchased on December 1, 2006;
 12 the declaration is irrelevant. Also, its conclusory assertions about Fannie securitization are
 13 impermissible legal conclusions. *Wicker v. Oregon*, 543 F.3d 1168, 1177 (9th Cir. 2008). **Second**,
 14 Plaintiffs try to use provisions in an "exemplar" trust agreement to prove when mortgages "held
 15 in trust" supposedly can or must be removed *out* of trust. Dkt. No. 107-4, Ex. A. Plaintiffs' attempts
 16 to prove the contents of this "exemplar" violate FRE 1002's Best Evidence Rule because Plaintiffs
 17 did not produce an "original." *United States v. Bennett*, 363 F.3d 947, 953 (9th Cir. 2004); *Seiler*
 18 *v. Lucasfilm, Ltd.*, 808 F.2d 1316, 1319 (9th Cir. 1987). And, Mr. Curcio's testimony indicates
 19 that the mortgage was securitized in 2006, three years before the "exemplar" was supposedly
 20 created. Ex. A, 44:18. So, the "exemplar" is irrelevant. No wonder Plaintiffs told this Court that
 21 the exemplar does not have "any specific relationship to the loan at issue in this case." Dkt. No.
 22 107, 10:27-28 n.4. **Third**, and as is explained below, the six-paragraph-declaration and "exemplar"
 23 are irrelevant because of 4617(b)(19)(B).⁶

24 **F. Plaintiffs have Made Judicial Admissions about Recorded DOT Assignments**

25 The June 28, 2011, DOT assignment is unilluminating because of judicial admissions that
 26 Plaintiffs have made in other cases and Plaintiffs' belief that this assignment's "limited interest

27
 28 ⁶ Plaintiffs' reliance on one of Fannie's Guides is bewildering because Plaintiffs believe such
 Guides do "not have the force of law." Dkt. No. 41, 15:12.

1 was merged with” the mortgage that Fannie allegedly purchased on December 1, 2006. Dkt. No.
 2 107, 8:5. Plaintiffs have told judges in this district that a recorded DOT assignment is irrelevant to
 3 whether Plaintiffs had an “interest” in a house at the time of an association sale. *LN Mgmt., LLC*
 4 *Series 5664 Divot v. Dansker*, No. 2:13-cv-01420-RCJ-GWF (Dkt. No. 54, 6:15-17); *Kielty v.*
 5 *Fed. Home Loan Mortg. Corp.*, No. 2:15-cv-00230-RCJ-GWF (Dkt. No. 44, 5:16-17); *LN*
 6 *Mgmt., LLC Series 7937 Sierra Rim v. Pfeiffer*, No. 2:13-cv-01934-JCM-PAL (D. Nev. 2015)
 7 (Dkt. No. 76, 11:3-4) (filed Oct. 27, 2015). Plaintiffs admit that, “[r]ecording is irrelevant to the
 8 existence of a property right or [4617(j)(3)’s] protection.” *LN Mgmt., LLC Series 7937 Sierra Rim*
 9 *v. Pfeiffer*, No. 2:13-cv-01934-JCM-PAL (Dkt. No. 76, 11:3-4). In fact, Plaintiffs maintain that
 10 language in an assignment is nothing more than “form language” that courts should ignore.
 11 *Dansker*, No. 2:13-cv-01420-RCJ-GWF (Dkt. No. 54, 12:22-28 – 13:1-17); *Pfeiffer*, No. 2:13-
 12 cv-01934-JCM-PAL (Dkt. No. 76, 9:10-14).⁷ Consequently, Plaintiffs have made judicial
 13 admissions about recorded DOT assignments.

14 **V. LEGAL ARGUMENT II: 4617(b)(19)(B) PRECLUDES SUMMARY JUDGMENT**

15 It is undisputed that the mortgage was “held in trust.” Dkt. No. 108-1, 44:15-16; Dkt. No.
 16 108-2, 2:3-6; Dkt. No. 108-3, 2:12-15. As a result, and pursuant to 4617(b)(19)(B), this Court
 17 should deny Plaintiffs’ Motion for Summary Judgment because they are not “entitled to judgment
 18 as a matter of law.” 56(a). Sadly, when it comes to 4617(b)(19)(B), Plaintiffs cannot bring
 19 themselves to “presume that a legislature says in a statute what it means and means in a statute
 20 what it says there.” *Connecticut Nat’l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). This is so
 21 because Plaintiffs are too scared of 4617(b)(19)(B)’s text, its plain meaning. It is out of fear that
 22 Plaintiffs replace one word (“held”) with another (“managed”). It is out of fear that Plaintiffs claim
 23 “in” actually means “out,” and that “general” is synonymous with “limited.” And it is out of fear
 24 that Plaintiffs strip away entire phrases from the United States Code, forgetting that Congress’s

25 ⁷ For purposes of summary judgment, courts have discretion to treat a litigant’s representations in
 26 briefs as judicial admissions. *Am. Title Ins. Co. v. Lacelaw Corp.*, 861 F.2d 224, 226-27 (9th Cir.
 27 2008). Courts exercise this discretion when a party “tried to benefit” from a representation.
 28 *Bonavito v. Nev. Prop. I, LLC*, No. 2:13-cv-417-JAD-CWH, 2013 WL 5707197, at *2 (D. Nev.
 Oct. 21, 2013). Here, Plaintiffs “tried to benefit” from the aforementioned DOT-assignment-
 representations in cases where an assignment was not recorded before an association’s sale.

1 words are not as easily manipulated as SIR printouts; 4617(b)(19)(B) is a duly enacted law, not an
 2 LAH column, or a declaration from Mr. Curcio. Textualphobia, a rare though pernicious fear of
 3 and aversion to textualism, is at it once again, haunting Plaintiffs at every heading, and cursing
 4 them at every clause from 4617(b)(19)(B)(i) through 4617(b)(19)(B)(iii). Thankfully,
 5 Textualphobia has a cure: The plain meaning rule. It is this rule that defeats Plaintiffs' arguments
 6 about 4617(b)(19)(B), 4617(j)(3), and so-called securitization.

7 The plain meaning rule also establishes why this Court should deny Plaintiffs' Motion for
 8 Summary Judgment. 4617(b)(19)(B)—as written and enacted by *Congress*—makes plain that if a
 9 mortgage is “described in” 4617(b)(19)(B)(i), then that mortgage “shall be held by” FHFA “in
 10 trust.” “Holding” is not succeeding, or transferring, or selling, or removing, or taking over. And
 11 “holding in” is not “removing from.” Instead, and as is established by the very text that scares
 12 Plaintiffs so much, **holding is an exception to succession**. Little else explains why *Plaintiffs*
 13 described evidence that the mortgage was “held in trust” as a “silver bullet.” Dkt. No. 99-2, 15:4-
 14 7. As such, FHFA did not “succeed to” the mortgage through 4617(b)(2)(A)(i). Without
 15 succession, the mortgage is not “property of” FHFA for purposes of 4617(j)(3), or for so-called
 16 “preemption.” Without so-called “preemption,” Plaintiffs cannot prove their quiet title claim
 17 because they cannot show that they have a supposed interest in the house, let alone an interest that
 18 is superior to SFR’s interests. 4617(b)(19)(B) defeats Plaintiffs’ Motion.

19 **A. Plaintiffs Rewrite 4617(b)(19)(B)(ii) by Replacing “Held” with “Managed”**

20 Plaintiffs deconstruct 4617(b)(19)(B)(ii) by claiming that the phrase “in accordance with
 21 the terms of the agreement creating such trust”—when read in isolation from the rest of
 22 4617(b)(19)(B)(ii)’s surrounding text, 4617(b)(19)(B)’s other clauses, and 4617(b)’s structure—
 23 supposedly establishes that FHFA “succeeds to” mortgages “held in trust.” Plaintiffs assert that “it
 24 would be absurd for HERA to mandate that the Conservator manage mortgages held in trust in any
 25 particular way if . . . the Conservator never succeeded to any interest in those mortgages and
 26 therefore had no power to manage them at all.” Dkt. No. 107, 15:13-16. This argument fails
 27 because 4617(b)(19)(B)(ii) does not use the word “manage.”⁸ Instead, Congress selected the word

28 ⁸ Plaintiffs’ reference to “absurdity” is another reason why their deconstruction of

1 “held.” Notably, the word “**held**” plays a significant role in 4617(b)(19)(B)(ii) because it modifies
 2 “by the conservator,” “for the beneficial owners of such mortgage,” and “in accordance with the
 3 terms of the agreement creating such trust.” To replace “held” with “manage”—as Plaintiffs
 4 inexplicably do—is to reject Congress’s linguistic link between “held” and nearly every textual
 5 phrase within 4617(b)(19)(B)(ii), an interpretive blunder of the highest order. *Badaracco v.*
 6 *Comm’r Internal Revenue*, 464 U.S. 386, 398 (1984); *In re Borba*, 736 F.2d 1317, 1320 (9th Cir.
 7 1984) (courts do not omit language from statute). By swapping “held” for “manage,” Plaintiffs
 8 also change 4617(b)(19)(B)’s heading from “Mortgages held in trust” to “Mortgages managed in
 9 trust.” They also alter 4617(b)(19)(B)(ii)’s heading from “Holding of mortgages” to “Management
 10 of mortgages.” Congress’s and Plaintiffs’ versions of 4617(b)(19)(B)(ii) appear below.

Congress’s Version	Plaintiffs’ Version
<p>(19) General exceptions (B) Mortgages held in trust (ii) Holding of mortgages Any mortgage . . . described in clause (i) shall be held by the conservator . . . in accordance with the terms of the agreement creating such trust . . .</p>	<p>(19) General exceptions (B) Mortgages held managed in trust (ii) Holding Management of mortgages Any mortgage . . . described in clause (i) shall be held managed by the conservator . . . in accordance with the terms of the agreement creating such trust . . .</p>

15 Ultimately, Plaintiffs rewrite 4617(b)(19)(B)(ii) by replacing “held” with “manage,” defying
 16 Congress’s intent and rudimentary tenets of statutory construction.

17 **B. “Holding in” is not Synonymous with “Removing from”**

18 Similarly, Plaintiffs replace “**held in**” with “removed from” and swap “shall” for “may.”
 19 Dkt. No. 107, 15:13-21. They opine that it would allegedly be “absurd” if FHFA lacked the power
 20 to “remove from” a trust “a mortgage held in trust.” *Id.* Under Plaintiffs’ argument, FHFA has the
 21 power to take a mortgage that is “held **in** trust” and remove it **out** of a trust—the exact opposite of
 22 what Congress intended. 4617(b)(19)(B)(ii). Talk about absurd. A mortgage cannot be held **in** a
 23 trust, when it has been removed **from** a trust; removing a mortgage causes it to be *out of*, not *in*, a
 24 trust. The laws of physics—never mind those enacted by Congress—do not even support Plaintiffs.

25 4617(b)(19)(B)(ii) fails. Particularly, the absurd results doctrine—which Plaintiffs ineptly
 26 invoke—is inapplicable to unambiguous laws, such as 4617(b)(19)(B)(ii). *Peabody Coal Co. v.*
 27 *Navajo Nation*, 75 F.3d 457, 468 (9th Cir. 1996). Along similar lines, by misreading the phrase
 28 “in accordance with the terms of the agreement creating such trust,” in isolation, Plaintiffs have
 committed yet another interpretive indiscretion, which in and of itself defeats Plaintiffs’
 deconstruction of 4617(b)(19)(B)(ii). *Smith v. United States*, 508 U.S. 223, 233 (1993).

1 *Dean v. United States*, 556 U.S. 568, 572 (2009) (Courts resist reading words into a law) (internal
 2 citation omitted). Essentially, “holding in” is not synonymous with “removing from.”

Congress's Version	Plaintiffs' Version
(19) General exceptions	(19) General exceptions
(B) Mortgages held in trust	(B) Mortgages held in removed from trust
(ii) Holding of mortgages Any mortgage . . . described in clause (i) shall be held by the conservator . . . in accordance with the terms of the agreement creating such trust . . .	(ii) Holding Removing of mortgages Any mortgage . . . described in clause (i) shall may be held removed by the conservator . . . in accordance with the terms of the agreement creating such trust . . .

7 **C. Plaintiffs' Deconstruction creates a Loophole around 4617(b)(19)(B)(i)**

8 The plain meaning of 4617(b)(19)(B)(ii) textually links the word “**held**” with the word
 9 “**terms**,” as in any mortgage held in trust “shall be **held** by the conservator . . . in accordance with
 10 the **terms** of the agreement creating such trust . . .” This link reveals that when FHFA is “holding”
 11 a mortgage “described in clause (i),” it does not have carte blanche access to *all* of the terms in the
 12 “agreement creating such trust.” Rather, the textual link between “shall be *held*” and “in
 13 accordance with the *terms*” conveys Congress’s intent to confine FHFA to a trust agreement’s
 14 “terms” that concern “holding” mortgages “in trust.” 4617(b)(19)(B)(ii). These “**terms**” inform
 15 FHFA about how it shall “**hold**” any mortgage “described in clause (i)” “**in trust**.” If FHFA has
 16 the power to remove or take a mortgage *out* of trust, then after FHFA does so, it can make that
 17 mortgage “available to satisfy the claims of creditors generally,” a consequence that will render
 18 4617(b)(19)(B)(i) superfluous. Congress did not intend for “the terms of the agreement creating
 19 such trust” to allow FHFA to take or remove mortgages *out* of trust in order to make them
 20 “available to satisfy the claims of creditors . . .” 4617(b)(19)(B)(i). And yet, that is what Plaintiffs’
 21 isolated *misreading* of a single phrase in 4617(b)(19)(B)(ii) contemplates. Hence, Plaintiffs’
 22 statutory *deconstruction* creates a loophole around 4617(b)(19)(B)(i); “held in” is swapped for
 23 “removed from,” “a regulated entity” becomes “the conservator,” and “may” replaces “shall not.”⁹

24
 25 ⁹ Plaintiffs nearly give away this point by incorrectly stating that 4617(b)(19)(B)(ii) supposedly
 26 means that “**while** a mortgage is held in trust, the Conservator’s power over that asset remains
 27 constrained by the terms of the relevant trust agreement.” Dkt. No. 107, 13:20-22 (emphasis
 28 added). The use of the word “*while*” announces a loophole to 4617(b)(19)(B)(i)’s prohibition that
 mortgages “held in trust” by Fannie “**shall not be available to satisfy the claims of creditors
 generally . . .**” If FHFA has the power to remove or take a mortgage *out* of trust, then after FHFA
 does so, it can make that mortgage “available to satisfy the claims of creditors generally,” a

Congress's Version	Plaintiffs' Version
(19) General exceptions	(19) General exceptions
(B) Mortgages held in trust	(B) Mortgages held in removed from trust
(i) In general	(i) In general
Any mortgage . . . held in trust . . . by a regulated entity . . . shall not be available to satisfy the claims of creditors generally . . .	Any mortgage . . . held in removed from trust . . . by a-regulated-entity the conservator . . . shall not may be available to satisfy the claims of creditors generally . . .

5 **D. 4617(b)(19)(B)(ii) does not Confirm FHFA's Power of Succession**

6 Plaintiffs suggest that 4617(b)(19)(B)(ii)—despite lacking confirmatory language—
 7 recognizes that FHFA can exercise the trustee's alleged right to remove a mortgage. Dkt. No. 107,
 8 12:22-28 – 14:1-20. So, when FHFA is purportedly removing a mortgage from a trust, it is acting
 9 as a *trustee*. But this is a barrier to 4617(j)(3)'s applicability. Pursuant to 4617(j)(1), “the
 10 provisions of this subsection shall apply with respect to the Agency in any case in which the
 11 Agency is acting as a conservator or a receiver.” Thus, when FHFA purportedly removes a
 12 mortgage “held in trust,” 4617(j)(3) is inapplicable because FHFA—according to Plaintiffs—is
 13 “acting as a” trustee, not “as a conservator.”

14 Furthermore, Plaintiffs erroneously insist that 4617(b)(19)(B)(ii)'s isolated phrase, “in
 15 accordance with the terms of the agreement creating such trust,” reveals that FHFA succeeded to
 16 mortgages “held in trust,” which Plaintiffs inaccurately believe are owned by Fannie. Dkt. No.
 17 107, 12:22-8 – 14:1-20. This position, however, erases an important phrase from
 18 4617(b)(19)(B)(ii): “The beneficial owners of such mortgage.” Plaintiffs erased this phrase
 19 because it disproves that FHFA “succeeds to” a mortgage “held in trust” and that Fannie owns a
 20 mortgage “held in trust.” Indeed, 4617(b)(19)(B)(ii) states that any mortgage held in trust “**shall**
 21 **be held by** the conservator . . . **for** the beneficial **owners** of such mortgage . . .” Thus, FHFA
 22 does not “succeed to” a mortgage “held in trust.” Rather, FHFA “shall hold” such a mortgage, and
 23 it shall do so for that mortgage's “owners.” 4617(b)(19)(B)(ii). And, Fannie is not the “owner” of

24
 25 consequence that will render 4617(b)(19)(B)(i) superfluous. Plaintiffs' *misreading* is as wrong as
 26 it is transparent: Supposedly, “*while*” a mortgage is “held in trust,” FHFA is allegedly
 27 “constrained”; to elude these constraints, FHFA—according to Plaintiffs—need only remove a
 28 mortgage *out* of trust. Dkt. No. 107, 13:20-22. Once this occurs, and a mortgage is *out* of trust,
 FHFA is—in keeping with Plaintiffs' atextual musings—unconstrained from making that
 mortgage “available to satisfy the claims of creditors,” working an end-run around
 4617(b)(19)(B)(i).

1 a mortgage “held in trust.” 4617(b)(19)(B)(i); 4617(b)(19)(B)(ii). Rather, the “owners” consist of
 2 “any person other than” Fannie. 4617(b)(19)(B)(i).

Congress's Version	Plaintiffs' Version
(19) General exceptions	(19) General exceptions
(B) Mortgages held in trust	(B) Mortgages held in removed from trust
(ii) Holding of mortgages Any mortgage . . . described in clause (i) shall 5 be held by the conservator . . . for the beneficial owners of such mortgage . . . in 6 accordance with the terms of the agreement creating such trust . . .	(ii) Holding Removing of mortgages Any mortgage . . . described in clause (i) shall may be held removed by the conservator . . . for the beneficial owners of such mortgage . . . 7 in accordance with the terms of the agreement creating such trust . . .

8 All told, 4617(b)(19)(B)(ii) does not confirm FHFA’s power of succession.

9 **E. Plaintiffs Misread a Phrase from 4617(b)(19)(B)(i) in Isolation**

10 Plaintiffs mistakenly believe that 4617(b)(19)(B)(i)’s phrase, “any mortgage . . . held in
 11 trust . . . shall not be available to satisfy the claims of creditors,” proves that Fannie “(and therefore
 12 the Conservator) *do* maintain a property interest in securitized mortgages.” Dkt. No. 107, 14:13-
 13 15. Yet, Plaintiffs’ isolated *misreading* of this phrase forgets that 4617(b)(19)(B)(i) “describes” a
 14 mortgage “held in trust” as: “Any mortgage . . . held in trust . . . by a regulated entity **for the**
 15 **benefit of any person other than the regulated entity . . .**” And, 4617(b)(19)(B)(ii)—when
 16 construed in conjunction with 4617(b)(19)(B)(i)—emphasizes that FHFA shall “hold” a mortgage
 17 “described in” 4617(b)(19)(B)(i) **“for the beneficial owners of such mortgage,”** who consist of
 18 “any person other than” Fannie. These words, which Plaintiffs conveniently erase from HERA,
 19 refute Plaintiffs’ atextual assertion that Fannie and FHFA “have a property interest” in mortgages
 20 “held in trust.” Plaintiffs’ statutory *deconstruction* of an isolated phrase from 4617(b)(19)(B)(i) is
 21 untenable. Pursuant to 4617(b)(19)(B)(i) and 4617(b)(19)(B)(ii), Congress intended that the
 22 “owners” of “any mortgage . . . held in trust” consist of “any person other than the regulated entity
 23 [Fannie].” The below chart shows how Plaintiffs rewrote 4617(b)(19)(B)(i). Ultimately, and as the
 24 below graphic illustrates, Plaintiffs *misread* a phrase from 4617(b)(19)(B)(i) in isolation.

Congress's Version	Plaintiffs' Version
(19) General exceptions	(19) General Limited exceptions
(B) Mortgages held in trust	(B) Mortgages held in trust
(i) In general Any mortgage . . . held in trust . . . by a 25 regulated entity for the benefit of any person 26 other than the regulated entity shall not be 27 available to satisfy the claims of creditors	(i) In general Limited Any mortgage . . . held in trust . . . by a 28 regulated entity for the benefit of any person other than the regulated entity shall not be available to satisfy the claims of creditors

1 generally . . .	generally . . .
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2 **F. Plaintiffs Rewrite 4617(j)(3) by Replacing “Conservator” with “Fannie”**¹⁰

3 Plaintiffs’ Textualphobia is not confined to 4617(b)(19)(B). Regrettably, Plaintiffs also
4 abandon 4617(j)(3)’s text. For instance, Plaintiffs state that 4617(j)(3) “provides that no property
5 of Fannie Mae in conservatorship ‘shall be subject to . . . foreclosure . . . without the consent of
6 [FHFA].’” Dkt. No. 107, 5:24-25. This is inaccurate; 4617(j)(3) expressly provides that “no
7 **property of the Agency** shall be subject to . . . foreclosure, or sale without the consent of the
8 Agency . . .” That provision does not read “no property of [Fannie] shall be subject to . . .
9 foreclosure, or sale without the consent of [Fannie] . . .” Congress defined the “Agency” as FHFA,
10 not Fannie. 12 U.S.C. § 4502(2).

11 Significantly, Plaintiffs’ mishandling of 4617(j)(3)’s text belies an overarching interpretive
12 error that they repeatedly make: In ascertaining whether a mortgage is “property of the Agency”—
13 for purposes of 4617(j)(3)—Plaintiffs incorrectly assume that the only pertinent fact is whether
14 that mortgage is an “asset of” Fannie, displaying a fixation on 4617(b)(2)(A)(i). This is why
15 Plaintiffs drone on about the purported nuances of Fannie securitization, the subtleties supposedly
16 animating trust jurisprudence, and what they believe is District of Columbia law. Dkt. No. 107,
17 10:1-24 – 11:1-22. Indeed, Plaintiffs erroneously assert that if a mortgage is an “asset of” Fannie,
18 then 4617(j)(3) “applies fully.” *Id.* at 11:21. Assuming *arguendo* that a “mortgage . . . held in trust”
19 is an “asset of” Fannie—which it is not¹¹—such a determination does not mean that FHFA has the
20 power to “succeed to” that mortgage. Instead, 4617(b)(19)(B) establishes that if a mortgage is
21 “held in trust,” then that mortgage “shall be held”—not “succeeded to”—by FHFA. *Id.* Again,
22 **holding is an exception to succession**. 4617(b)(19)(B). By fixating on whether a mortgage is an
23 “asset of” Fannie, for purposes of 4617(b)(2)(A)(i) and 4617(j)(3), Plaintiffs: (i) read
24 4617(b)(19)(B) out of HERA, (ii) render all three of 4617(b)(19)(B)’s clauses superfluous, and

25
26 ¹⁰ Plaintiffs’ concerns about the length of time that a mortgage can remain “in trust” are misguided;
27 as with most aspects of FHFA’s conservatorship, 4617(b)(19)(B)’s provisions are confined to the
28 duration of FHFA’s conservatorship or receivership.

29 ¹¹ See, e.g., Dkt. No. 108, 25:24-28 n.16 (explaining that 4617(b)(19)(B) also indicates that
30 mortgages “held in trust” are not “assets of the regulated entity.”).

1 (iii) nullify Congress's intent. Because Plaintiffs rewrite, and ultimately erase 4617(b)(19)(B) from
 2 HERA, they inaccurately insist that "securitization in no way impacts the Conservator's succession
 3 to [a mortgage held in trust] or the protection of [4617(j)(3)]." Dkt. No. 107, 9:7-8. This is entirely
 4 contrary to 4617(b)(19)(B)'s plain meaning and Congress's intent.¹² Either way, Plaintiffs rewrite
 5 4617(j)(3) by replacing "conservator" with "Fannie." 4617(b)(19)(B)'s text precludes Plaintiffs
 6 from obtaining summary judgment; it is the "silver bullet" to their claims. Dkt. No. 99-2, 15:4-7.

7 **VI. LEGAL ARGUMENT III: DEPRIVATION IS NOT PREEMPTION**

8 This Court should deny Plaintiffs' Motion for Summary Judgment because this case's due
 9 process violations prevent Plaintiffs from "being entitled to judgment as a matter of law." 56(a).¹³

10 **A. The Supreme Court's Analytical Approach to Due Process**

11 The Supreme Court's analytical approach to due process uses three principles to determine
 12 whether a "property" interest exists and whether a "deprivation" has occurred. **The first principle**
 13 is that due process "[i]mposes constraints on governmental *decisions* which deprive individuals
 14 of" property. *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976) (emphasis added). **The second**
 15 **principle** is that "property" interests attain "constitutional status by virtue of the fact that they have
 16 been initially recognized and protected by state law . . ." *Paul v. Davis*, 424 U.S. 693, 710 (1976).

17 ¹² Plaintiffs argue that 4617(b)(19)(B)'s plain meaning—i.e. holding is an exception to
 18 succession—is "absurd" because Congress knew that Fannie's charter allows it to securitize
 19 mortgages. Dkt. No. 107, 16:12. This is wrong. Plaintiffs' reliance on Fannie's charter fails
 20 because the charter is neither the product of nor exclusively deals with the conservatorship context.
 21 Contrastingly, 4617(b)(19)(B) is the product of and exclusively pertains to the conservatorship
 22 context. More precisely, Fannie's charter primarily contemplates an independent Fannie, a non-
 23 defaulted "regulated entity." 12 U.S.C. § 4502(8)(A) (defining a "defaulted regulated entity"). Not
 24 so with 4617(b)(19)(B); that provision governs instances when Fannie is in default and under
 25 FHFA-conservatorship or receivership. In reality, what Plaintiffs describe as "absurd" is a policy
 26 decision that Congress made and enacted into law. The same can be said about Plaintiffs' public
 27 policy pronouncements, not a single one of which is supported by admissible evidence.

28 ¹³ SFR has already detailed this case's due process violations. Dkt. No. 32. First, Plaintiffs
 29 acknowledge that *under Nevada law*, SFR has interests in the house, including free and clear title.
 30 Dkt. No. 41, 10:24-25 n.4. Second, Plaintiffs tacitly conceded that FHFA is a government actor.
 31 *Compare* Dkt. No. 32, 5:19-28 – 7:1-28, and Dkt. No. 48, 19:3, with Dkt. No. 41. Third, FHFA's
 32 decision not to consent deprived SFR of "property." Fourth, this deprivation occurred without due
 33 process because 4617(j)(3) is bereft of any procedures for SFR to request FHFA's consent or an
 34 opportunity for SFR to contest FHFA's decision not to consent. And, because no procedures for
 35 requesting FHFA's consent are publicly available, due process required FHFA to provide notice
 36 of such procedures. As no such notice was given, due process was violated.

1 State law's recognition of an interest establishes the existence of "property." *Id.* If state law
 2 recognizes an interest, then due process is triggered. *Ralls Corp. v. CFIUS*, 758 F.3d 296, 316
 3 (D.C. Cir. 2014). **The third principle** is that "deprivation" occurs when a government actor's
 4 decision alters or nullifies a state-recognized interest. *Paul*, 424 U.S. at 711.

5 **B. Plaintiffs Violate the Supreme Court's Second Principle**

6 Plaintiffs try to transform deprivation into preemption by attacking the Supreme Court's
 7 second principle: If state law recognizes an interest, then it is "property." They do so by insisting
 8 that *federal law* (i.e. 4617(j)(3)), and not state law, purportedly establishes whether SFR has any
 9 interests—such as free and clear title—in SFR's house. According to Plaintiffs, 4617(j)(3)
 10 "governed the transfer of interests" when Association sold the house to SFR. Dkt. No. 107, 18:7.
 11 **This repudiates the Supreme Court's second principle.** *Paul*, 424 U.S. at 710. Consider that
 12 even in cases where state and federal law interact—like this lawsuit—courts assess whether state
 13 law recognizes property interests. *United States v. James Daniel Good Real Prop.*, 510 U.S. 43,
 14 53-54 (1993) (Hawaiian property law and federal civil forfeiture statute); *Ralls*, 758 F.3d at 316
 15 (Oregon property law and federal Defense Production Act). If the answer is "yes," then due process
 16 applies. *Paul*, 424 U.S. at 710. Here, Nevada law recognizes SFR's interests, thereby triggering
 17 due process. Hence, Plaintiffs violate the Supreme Court's second principle.

18 **C. The Supreme Court's Third Principle Defeats Plaintiffs' Arguments**

19 Plaintiffs try to transform deprivation into preemption by targeting the Supreme Court's
 20 third principle: "Deprivation" occurs when a government actor's decision nullifies state-
 21 recognized interests. *Paul*, 424 U.S. at 711. In Plaintiffs' misguided estimation, this principle is
 22 inapplicable because 4617(j)(3) is purportedly an absolute prohibition, an allegedly "absolute bar."
 23 Dkt. No. 107, 6:11. Plaintiffs' position fails because it rewrites 4617(j)(3) as follows: "No property
 24 of the Agency shall be subject to . . . foreclosure or sale, ~~without the consent of the Agency . . .~~"
 25 Plaintiffs' treatment of 4617(j)(3) as an absolute prohibition impermissibly deletes language from
 26 a statute. *Williams v. Duke Energy Int'l, Inc.*, 681 F.3d 788, 805 (6th Cir. 2012); *Hesperos v.*
 27 *Sandaa*, 265 F. 921, 923 (4th Cir. 1920). The deleted words, "without the consent of the Agency,"
 28 prevent 4617(j)(3) from being an absolute prohibition because they authorize a government actor

1 (“the Agency”) to make a decision concerning consent (“the consent”). Indeed, Congress knows
 2 how to draft absolute prohibitions, as it did in 4617(j)(4), “[t]he Agency shall not be liable for . . .
 3 penalties or fines” If Congress wanted 4617(j)(3) to be an absolute prohibition, then it would
 4 have drafted it in the same way that it drafted 4617(j)(4). But Congress did not so intend, and thus
 5 drafted 4617(j)(3) differently from 4617(j)(4). Lastly, even in cases with true absolute prohibitions,
 6 due process still applies. *James Daniel Good*, 510 U.S. at 47 n.1; *Brock v. Roadway Express, Inc.*,
 7 481 U.S. 252, 258 (1987); *Pillsbury Co. v. FTC*, 354 F.2d 952, 953 (5th Cir. 1966). In the end, the
 8 Supreme Court’s third principle defeats Plaintiffs’ arguments.

9 **D. The Decision Due Process Context shows why Deprivation is not Preemption**

10 This case involves a particular due process context: the Decision Due Process Context.
 11 *James Daniel Good*, 510 U.S. 43; *Brock*, 481 U.S. 252; *Ralls*, 758 F.3d 296; *United States v.*
 12 *Bacon*, 546 F. App’x 496 (5th Cir. 2013); *Nat’l Council of Resistance of Iran v. Dep’t of State*,
 13 251 F.3d 192 (D.C. Cir. 2001); *Pillsbury*, 354 F.2d 952. This context concerns: (i) state-recognized
 14 property interests, (ii) a federal law that authorizes a government actor to make decisions that
 15 nullify those interests, and (iii) a government actor’s decision nullifies those interests without due
 16 process. *Id.* Such *decisions* do not “preempt” state law; they *deprive* individuals of property. *Id.*

17 For example, in *Ralls* an American corporation (Ralls Corp.), owned by two Chinese
 18 nationals, purchased four Oregon LLCs and their assets, including easements and several
 19 contracts; Oregon property law recognized and protected these interests. Pursuant to the Defense
 20 Production Act of 1950 (“DPA”), a federal agency analyzed the sale and referred it to the President
 21 due to national security concerns. The DPA authorized the President to nullify Ralls’s property
 22 interests if the President decided there was a threat to national security. After reviewing the
 23 transaction, the President decided a threat to national security existed, thus nullifying Ralls’s
 24 interests. *Ralls*, 758 F.3d at 306. Yet, the DPA did not afford Ralls constitutionally sufficient notice
 25 or an opportunity to be heard before the President made his decision; the statute had a dearth of
 26 procedural participation and protections. *Id.* at 320. The D.C. Circuit determined “[t]his lack of
 27 process constitutes a clear constitutional violation, notwithstanding the Appellees’ substantial
 28 interest in national security and despite our uncertainty that more process would have led to a

1 different presidential decision.” *Id.* The same deficiencies plague 4617(j)(3), which does not afford
 2 SFR notice or an opportunity to be heard before FHFA decided not to consent.

3 Like *Ralls*, there are other cases where a government actor’s decision deprived—not
 4 “preempted”—state-recognized property interests without due process. In *Brock*, the Secretary of
 5 Labor decided a trucking company fired one of its drivers for whistleblowing in violation of the
 6 Surface Transportation Assistance Act of 1982. This decision deprived the trucking company of
 7 its state-recognized interest in being able to fire employees. Due process was violated because the
 8 trucking company did not receive sufficient notice before the Secretary’s decision. *Brock*, 481 U.S.
 9 at 257, 268. *National Council of Resistance of Iran* (“*NCRI*”) dealt with the Secretary of State’s
 10 decision to designate an entity as an alias of a foreign terrorist organization consistent with the
 11 Anti-terrorism and Effective Death Penalty Act of 1996 (“*AEDPA*”). This decision deprived the
 12 entity of an interest in a bank account without due process of law because the *AEDPA* did not
 13 provide notice or an opportunity to be heard before the Secretary’s decision. *NCRI*, 251 F.3d at
 14 208. In *Pillsbury*, the Federal Trade Commission (“*FTC*”) decided that the Pillsbury Company’s
 15 acquisition of two companies and their assets “lessen[ed] competition” under the Clayton Act. This
 16 decision nullified Pillsbury’s state-recognized property interests in the companies. Due process
 17 was violated because a United States Senate subcommittee hearing had improperly intruded into
 18 the *FTC*’s then still-pending review of Pillsbury’s acquisitions. *Pillsbury*, 354 F.2d at 963. *James*
 19 *Daniel Good* concerned the United States’ decision to *ex parte* seize a house and land that belonged
 20 to a person who had pled guilty to drug charges; at the time, the house was being rented. The
 21 government’s decision—made pursuant to civil forfeiture laws—deprived the owner of state-
 22 recognized property interests. Due process was violated because the owner was not given notice
 23 or an opportunity to be heard. *James Daniel Good*, 510 U.S. at 46. A similar set of circumstances
 24 occurred in *Bacon*, where the United States Customs and Border Protection decided to destroy
 25 electronics that belonged to an individual convicted of possessing child pornography. This decision
 26 ran afoul of due process because Customs did not give the owner of the electronics constitutionally
 27 sufficient notice. *Bacon*, 546 F. App’x at 501.

28 *Ralls, Brock, NCRI, Pillsbury, James Daniel Good, and Bacon* are due process cases where

1 a government actor's decision deprived individuals of state-recognized interests. Plaintiffs seek to
 2 change all of this, mutating due process *deprivation* cases into "preemption" precedent, where a
 3 government actor's decision "preempts" state-recognized interests. No longer will decisions
 4 *deprive* people of property; they will, instead, "preempt" rights from materializing in the first
 5 place—effectively doing away with due process. Significantly, the Supreme Court has already
 6 rejected a similarly bloated version of "preemption" in the Taking Clause context. *Ruckelshaus v.*
 7 *Monsanto Co.*, 467 U.S. 986, 1012 (1984). The Environmental Protection Agency ("EPA")
 8 claimed it had "preempted"—instead of taken—a pesticide registration applicant's state-
 9 recognized interests. The Supreme Court determined EPA's argument "proves too much" because
 10 "[i]f Congress can 'pre-empt' state property law in the manner advocated by EPA, then the Taking
 11 Clause has lost all vitality." *Id.* The same holds here; if FHFA can "preempt" state-recognized
 12 interests as Plaintiffs allege, then due process "[h]as lost all vitality." *Id.* At bottom, the Decision
 13 Due Process Context shows why deprivation is not preemption.

14 **E. 4617(j)(3) is not Self-executing**

15 Plaintiffs claim that 4617(j)(3) is self-executing, possessing a purportedly "automatic
 16 preemptive effect." Dkt. No. 107, 6:4. Supreme Court cases and 4617(j)(3)'s text refute this claim.
 17 To begin with, self-executing laws function on their own, without the involvement of a government
 18 actor; they uniformly impact all citizens by articulating the circumstances under which property
 19 interests will lapse. *Tulsa Prof'l Collection Services, Inc. v. Pope*, 485 U.S. 478, 486 (1988);
 20 *Texaco, Inc. v. Short*, 454 U.S. 516, 530, 533-37 (1982). Meanwhile, a statute is not self-executing
 21 when it authorizes a government actor—other than the legislature—to make individualized
 22 decisions that nullify property interests, ensuring that "[t]he property interest was taken only after
 23 a specific determination that the deprivation was proper." *Texaco*, 454 U.S. at 537. Within non-
 24 self-executing laws, government actors have a "role to play beyond enactment" of the statute.
 25 *Tulsa*, 485 U.S. at 486. Here, 4617(j)(3) is not self-executing because: (i) 4617(j)(3)'s reference to
 26 "the Agency" means a government actor (i.e. FHFA)—other than Congress—is involved, (ii)
 27 4617(j)(3) authorizes FHFA to make a "specific determination" (i.e. whether to "consent"), and
 28 //

1 (iii) that determination nullifies state-recognized interests.¹⁴ Thus, 4617(j)(3) is not self-executing.

2 **F. The Legislative Acts Doctrine is Inapplicable**

3 Under the legislative acts doctrine, due process is satisfied if a legislature properly enacts
 4 a generally applicable law that impacts a large group of people, covers considerable amounts of
 5 land, and does not target specific individuals. *Hotel & Motel Ass'n of Oakland v. City of Oakland*,
 6 344 F.3d 959, 969 (9th Cir. 2003). The doctrine is limited to “a legislatively mandated substantive
 7 change in the scope of [an] entire program.” *Atkins v. Parker*, 472 U.S. 115, 129 (1985); *Ortiz v.*
 8 *Eichler*, 794 F.2d 889, 894 (3d Cir. 1986). It does not apply to “the procedural fairness of
 9 individual eligibility determinations.” *Id.* Here, FHFA’s decision not to consent is individualized;
 10 4617(j)(3)’s phrase “*the* consent” connotes an individualized decision.¹⁵ Thus, the legislative acts
 11 doctrine is inapplicable because FHFA’s decision is an “individual . . . determination[,]” the
 12 “fairness” of which is dictated by due process. *Atkins*, 472 U.S. at 129.¹⁶

13 **G. 4617(j)(3)’s Unconstitutionality Bars Preemption**

14 An unconstitutional law cannot preempt state law. *Alden v. Maine*, 527 U.S. 706, 731
 15 (1999); *S.J. Groves & Sons, Co. v. Fulton Cnty.*, 920 F.2d 752, 763 (11th Cir. 1991). As this
 16 Response details, 4617(j)(3) is unconstitutional, preventing it from preempting Nevada law.

17 **H. 4617(j)(3) does not Expressly Preempt Nevada Law**

18 If a law’s “plain wording” does not reveal that Congress had a “clear and manifest”

19
 20 ¹⁴ *Bollow v. Fed. Reserve Bank of San Francisco*, 650 F.2d 1093 (9th Cir. 1981) and *Beal Bank, SSB v. Nassau Cnty.*, 973 F. Supp. 130 (E.D. N.Y. 1997) do not prove that 4617(j)(3) is self-
 21 executing. According to Plaintiffs, *Bollow* determined that a reserve bank’s discretion “did not
 22 affect the federal law’s preemptive effect” Dkt. No. 107, 6:18. In reality, *Bollow* concluded
 23 that a **reserve bank lacked discretion**, not that its discretion was incapable of “affect[ing] the
 24 federal law’s preemptive effect” *Bollow*, 650 F.2d at 1097-98. *Beal Bank* dealt with whether
 25 the FDIC had implicitly consented under 12 U.S.C. § 1825(b)(2); the words “decision” or “decide”
 26 do not appear in *Beal Bank*. *Beal Bank*, 973 F. Supp. at 133-34.

27 ¹⁵ Congress’s use of the word “*the*” demonstrates that FHFA’s decision is individualized. *In re Cardelucci*, 285 F.3d 1231, 1234 (9th Cir. 2002) (definite article “*the*” connotes individualization).

28 ¹⁶ *Halverson* and *Samson* are distinguishable. *Halverson v. Skagit Cnty.*, 42 F.3d 1257, 1259-60,
 1263 (9th Cir. 1994) involved a county’s “legislatively mandated substantive change in the scope”
 of their flood program by adopting a 25-year flood plan. In *Samson*, a city adopted several
 ordinances that imposed a moratorium on “shoreline substantial development [permit]
 applications.” *Samson v. City of Bainbridge Island*, 683 F.3d 1051, 1053-54 (9th Cir. 2012).
 Neither case implicated “the procedural fairness” of individual determinations.

1 preemptive intent, then courts refuse to preempt state law. *Sprietsma v. Mercury Marine*, 537 U.S.
 2 51, 62 (2002). Here, the “plain wording” of 4617(j)(3) is “[n]o property of the Agency shall be
 3 subject to . . . foreclosure, or sale without the consent of the Agency . . .” These words reveal
 4 Congress’s purpose in enacting 4617(j)(3) and describe how 4617(j)(3) functions. Congress’s
 5 **purpose** was to authorize a government actor (FHFA) to make individualized decisions regarding
 6 consent. Plaintiffs concede that 4617(j)(3) gives FHFA “authority to decide whether to consent to
 7 an extinguishment . . .” Dkt. No. 41, 2:22-24. FHFA’s decision is at the heart of how 4617(j)(3)
 8 functions. The law **functions** as follows: If FHFA decides not to consent to extinguishment, then
 9 that decision nullifies state-recognized property interests; FHFA’s decision causes *deprivation*, not
 10 “preemption.” 4617(j)(3)’s purpose and function establish that Congress did not have a “clear and
 11 manifest” intent for 4617(j)(3) to “preempt” Nevada law. Rather, Congress intended 4617(j)(3) to
 12 be a provision that authorizes FHFA to make individualized decisions (4617(j)(3)’s **purpose**) that
 13 nullify state-recognized property interests (how 4617(j)(3) **functions**). This is confirmed by
 14 comparing 4617(j)(3)’s purpose and function with two self-executing laws, both of which surround
 15 and hence comprise 4617(j)(3)’s statutory context—4617(j)(2) and 4617(j)(4).

16 Pursuant to 4617(j)(2), “[t]he Agency . . . shall be exempt from all taxation . . .” As for
 17 4617(j)(4), “[t]he Agency shall not be liable for . . . penalties or fines . . .” Both 4617(j)(2) and
 18 4617(j)(4) **function** on their own; they are self-executing. No government-actor-decision occurs
 19 within these subsections. Put differently, the way in which 4617(j)(2) and 4617(j)(4) function does
 20 not depend on a government actor’s individualized decision. Contrastingly, the way in which
 21 4617(j)(3) functions does depend on a government actor’s individualized decision. Ultimately, the
 22 difference between how 4617(j)(3) functions and how 4617(j)(2) and 4617(j)(4) function
 23 establishes that Congress did not have a “clear and manifest” intent for 4617(j)(3) to “preempt”
 24 Nevada law. *See generally Dep’t of Revenue of Oregon v. ACF Indus., Inc.*, 510 U.S. 332, 340
 25 (1994) (previous subsections help construe subsequent subsection).

26 Plaintiffs disagree, insisting 4617(j)(3) expressly preempts Nevada law. They attribute
 27 preemption to 4617(j)(3)’s **initial phrase** “[n]o property of the Agency shall be subject to . . .
 28 foreclosure . . .” Assuming *arguendo* that 4617(j)(3)’s initial phrase is preemptive, 4617(j)(3)’s

1 **subsequent phrase** (“without the consent of the Agency”) would, at a minimum, limit the
 2 “preemptive” scope of 4617(j)(3)’s initial phrase because any decision concerning consent must
 3 be “appropriate.” 4617(b)(2)(D)(ii); *Mid-Con Freight Sys., Inc. v. Michigan Pub. Serv. Comm’n*,
 4 545 U.S. 440, 447-49 (2005) (subsequent phrase limited scope of preceding phrase). Therefore,
 5 under Plaintiffs’ distorted version of “preemption,” if FHFA’s decision is not “appropriate,” then
 6 there is no so-called “preemption”; FHFA has not satisfied a predicate to preemption.¹⁷ Here,
 7 FHFA’s decision was not “appropriate” because it violated due process, meaning that under
 8 Plaintiffs’ flawed reading of 4617(j)(3), “preemption” cannot occur because FHFA’s decision was
 9 not “appropriate.” Ultimately, a preemptive intent is at odds with 4617(j)(3)’s “plain wording.”

10 **I. Obstacle Preemption is Inapplicable**

11 Implied conflict preemption occurs when a state law is ““an obstacle to the . . . purposes and
 12 objectives of Congress.”” *Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597, 605 (1991) (quoting
 13 *Hines v. Davidowitz*, 312 U.S. 52, 61 (1941)). Here, Plaintiffs incorrectly believe that NRS 116
 14 “stands as an obstacle” to FHFA’s power to “preserve and conserve” Fannie’s alleged assets, a
 15 power that supposedly gives FHFA “exclusive authority to decide whether to consent to an
 16 extinguishment . . .” Dkt. No. 41, 2:22-24. Because Plaintiffs connect FHFA’s decision regarding
 17 consent with FHFA’s 4617(b)(2)(D)(ii) power to “preserve and conserve,” Congress’s intent about
 18 the limits of this power dictates 4617(j)(3)’s “preemptive” meaning and scope. As will now be
 19 explained, Congress intended to and did impose limits on FHFA’s power to “preserve and
 20 conserve.” If these limits are exceeded, then so-called “preemption” cannot occur. For starters, the
 21 Ninth Circuit determined that FHFA’s conservatorship powers “[a]re not limitless.” *Cnty. of*
 22 *Sonoma v. FHFA*, 710 F.3d 987, 994 (9th Cir. 2013). FHFA must follow the Constitution and
 23 4617(b)(2)(D)(ii)’s mandate that FHFA’s decision must be “appropriate.” Violations of due
 24 process prevent FHFA’s decision from being an “appropriate” “preemption” of Nevada law.

25 The relationship between 4617(j)(1) and 4617(b)(2)(J)(ii) reveals an additional statutory

26
 27 ¹⁷ This analysis is consistent with cases where the Supreme Court refused to preempt state law
 28 because a government actor’s decision did not satisfy a predicate to preemption. *Sprietsma*, 537
 U.S. at 63-64; *Freightliner Corp. v. Myrick*, 514 U.S. 280, 289 (1995).

1 limit on FHFA’s power to “preserve and conserve.” Pursuant to 4617(j)(1), “[t]he provisions of
 2 this subsection [4617(j)] shall apply with respect to the Agency in any case in which the Agency
 3 is **acting as** a conservator” The scope of the phrase “acting as” is limited by 4617(b)(2)(J)(ii),
 4 which provides that FHFA “may, as conservator . . . take any action **authorized** by this section
 5 [4617]” As a result, Congress limited FHFA to “authorized” action. Thus, FHFA’s decision
 6 to “preserve and conserve”—even when that decision is mischaracterized as being one of
 7 “preemption”—must be “authorized.” Here, FHFA’s decision was not “authorized” because it
 8 violated due process; Congress cannot authorize FHFA to act unconstitutionally. Consequently,
 9 FHFA’s decision, and any so-called “preemption” of Nevada law, are “unauthorized.”

10 Another statutory limit on FHFA’s power to “preserve and conserve” is the balance that
 11 Congress struck between state and federal law within HERA. Several HERA provisions
 12 incorporate or rely on state law, illustrating Congress’s intent to perpetuate rather than “preempt”
 13 state law. Topics include: fraudulent transfer, 4617(b)(15), contracts, 4617(d), torts,
 14 4617(b)(13)(B), standard of care for officer liability, 4617(g)(2), bona-fide purchaser defense,
 15 4617(b)(15)(C), and existing private rights of action, 4638. As such, characterizing FHFA’s
 16 decision as “preempting” Nevada law will upset this balance. *Bond v. United States*, 572 U.S. ___,
 17 134 S.Ct. 2077, 2088 (2014) (Congress legislates against background principles including
 18 presumption against preemption). Contrastingly, recognizing that FHFA’s decision not to consent
 19 nullifies state-recognized property interests will maintain that balance because it will necessitate
 20 that such nullification must comport with due process.

21 History also limits FHFA’s power to “preserve and conserve.” Particularly, courts consider
 22 how government actors have approached a federal law in the past; legal positions taken in appellate
 23 briefs, for instance, are reviewed. *Chamber of Commerce of U.S. v. Whiting*, 563 U.S. ___, 131
 24 S.Ct. 1968, 1986 (2011). Here, FHFA’s briefing in the Ninth Circuit *Sonoma* case demonstrates
 25 Nevada law is not an “obstacle to . . . the full purposes and objectives of Congress.”” *Mortier*, 501
 26 U.S. at 605 (quoting *Hines*, 312 U.S. at 61)). In *Sonoma*, FHFA instructed Fannie to refrain from
 27 buying mortgages that were subjected to property-assessed clean energy (“PACE”) liens. *Sonoma*,
 28 710 F.3d at 992. The Ninth Circuit noted PACE liens were “superior” to Fannie mortgages and

1 “[s]peaking generally, foreclosure of a higher-priority—senior—lien on property (e.g., a PACE
 2 lien) terminates” Fannie’s liens. *Id.* at 990. And this is precisely what FHFA contended in its briefs,
 3 “in the event of a foreclosure, the PACE lender will be paid first from the proceeds of the
 4 foreclosure sale, and [Fannie] will, in all likelihood, be the party that suffers the loss.” Ex. L, 6
 5 (internal document pagination). This *historical* understanding of extinguishment disproves
 6 Plaintiffs’ *present* arguments that 4617(j)(3) “preempts” Nevada law, thereby serving as an
 7 historical limit on FHFA’s power to “preserve and conserve.”

8 Finally, the Ninth Circuit determined that FIRREA does not preempt state contract law, a
 9 conclusion that should apply to HERA. *Bank of Manhattan, N.A. v. FDIC*, 778 F.3d 1133, 1136
 10 (9th Cir. 2015). Here, Association’s CC&Rs is a contract. Association’s sale to SFR occurred, in
 11 part, via its CC&Rs. Dkt. No. 70-1, Ex. 3, 1:¶2. As a result, Nevada contract law informs SFR’s
 12 purchase of the house. This means that SFR’s interests are not obstacles to Congress’s “purposes
 13 and objectives.” *Mortier*, 501 U.S. at 605. Obstacle preemption is inapplicable.

14 **VII. CONCLUSION**

15 For the foregoing reasons, this Court should deny Plaintiffs’ Motion for Summary
 16 Judgment. **First**, Plaintiffs’ evidence is not ““so powerful that no reasonable jury would be free to
 17 disbelieve it.”” *Shakur*, 514 F.3d at 890. **Second**, it is undisputed that the mortgage was “held in
 18 trust.” **Third**, Plaintiffs ask this Court to transform due process deprivations into preemption.

19 Notably, Mr. Curcio’s deposition testimony and Plaintiffs’ supplemental interrogatory
 20 responses are evidence that proves that the mortgage was “held in trust.” Dkt. No. 108-1, 44:15-
 21 16; Dkt. No. 108-2, 2:3-6; Dkt. No. 108-3, 2:12-15. Such evidence negates the most essential
 22 element of Plaintiffs’ quiet title claim: The allegation that FHFA supposedly “succeeded to” the
 23 mortgage. This is so because if the mortgage was “held in trust,” then FHFA did not—and
 24 cannot—“succeed to” the mortgage. Instead, Congress intended and commanded FHFA to “hold”
 25 the mortgage “in trust.” **Holding is an exception to succession.** This Court should deny Plaintiffs’
 26 Motion for Summary Judgment and instead grant SFR’s Motion for Summary Judgment.

27 **VIII. REQUEST FOR JUDICIAL NOTICE**

28 Pursuant to FED. R. EVID. 201, SFR Investments Pool 1, LLC (“SFR”) respectfully requests

1 this Court to take judicial notice of **EXHIBITS B, C, D, E, F, G, I, J, K, and L**. **EXHIBIT B** is the
2 publicly recorded March 10, 2014, Notice of Default and Election to Sell Under Deed of Trust.
3 **EXHIBITS C, D, E, F, G, I, J, K, and L** were filed in federal or state courts. *United States v. 14.02*
4 *Acres of Land More or Less in Fresno Cnty.*, 547 F.3d 943, 955 (9th Cir. 2008) (taking judicial
5 notice of matters of public record).

6 RESPECTFULLY SUBMITTED this 4th day of April, 2016.

7 **KIM GILBERT EBRON**

8 /s/Jesse N. Panoff

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 4th day of April, 2016, pursuant to FRCP 5, I served via the CM/ECF filing system the foregoing Response to the following parties:

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